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Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Attention: Docket No. FCC 97-182

97-138

To whom it may concern:

The Aircraft Owners and Pilots Association (AOPA) representing over 340,000 aircraft owners and pilots nationwide is opposed to the Notice of Proposed Rule Making (NPRM); *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Transmission Facilities.* The general aviation community is the largest population of airspace and airport users in the United States and have a significant interest in the safety and efficiency of the National Airspace System(NAS). AOPA strongly opposes this NPRM on the grounds that preemption of state and local zoning laws, ordinances and regulations will result in new hazards to aerial operations, aircraft, and passengers in the Unites States.

Because of an arbitrary and aggressive implementation schedule, the proponents of Digital Television (DTV) consider state and local zoning as obstacles to their artificially imposed time constraints. For this reason, the industry petitioned the Federal Communications Commission (FCC) for the above referenced NPRM that would essentially circumvent well established state and local zoning protection.

Accelerated implementation of DTV should not be accomplished at the expense of the flying public and it would be an oversimplification to state that current state and local zoning unreasonably delay broadcast facilities construction. (II, Background, .4 , page 2-3). Federally mandated "time limits" cannot be enforced nor expected to be complied with in a standardized manner all across the country. The principle as described in the NPRM proposes to remove from local consideration regulations based on the environmental or health effects of radio frequencies emissions, interference with other telecommunication signals, and would also remove from local consideration regulations concerning tower marking and lighting provided that the facility complies with applicable Commission or FAA regulations. As provided for in the NPRM, the proposed changes **are related to the health and safety of the flying public** (II, Background, .4, page 2-3).

This proposed rule creates a fundamental conflict of interest within the federal government. The government has established obstruction related standards to ensure public safety on one hand and bypass that same system and its enforceability links with state and local governments on the other, in an attempt to facilitate the implementation of DTV.

The NPRM states that the Commission had the authority to preempt where state or local law stands as an obstacle (III, Discussion, .6, page 3) to the accomplishment and execution of the full objectives of Congress. This creates a conflict of interest when compared to the mandated authority and role that Congress has instituted with the Federal Aviation Administration (FAA) in terms of aviation safety.

The 1996 Telecommunications Act and associated 47 U.S.C. 151 do not justify, mandate or even insinuate that state and local zoning is to be ignored. "To make available, so far as possible..." should not include or be attempted at the expense of aviation safety. Again, 47 U.S.C. 151 "It shall be the policy of the United States to encourage the provision of new technologies and services to the public" certainly does not intend to achieve it at the expense of state and local zoning, especially when it relates to airport and aviation safety. (III, Discussion, .7, page 4). The fact that historically the FCC has sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement is illustrative of not only common sense, but also mirrors previous congressional policy (III, Discussion,.8, page 4).

Airports are endangered by constant encroachment of the approach and departure slopes by towers or other vertical obstructions which are impediments to airport safety clearances. Obstructions can be caused by terrain, buildings, towers, and trees or any object that penetrates what can be defined as navigable airspace. Penetrations to navigable airspace may cause unsafe conditions at an airport and may have to be removed, lowered or reconstructed. In many cases, this cannot be accomplished without local and state intervention and guidance, hence the impact of the FCC NPRM.

Since 1928, zoning has been the answer to the problem of airport protection from obstructions. In 1930, the Department of Commerce recommended: "Municipalities and other political subdivisions authorize to do so, exercise the police power in promulgation of properly coordinated zoning ordinances applying equitably to the public airports and intermediate landing fields, and to commercial airports of the public utility class, as well as other land uses."

This same concern was vividly made public again in 1938 by the Civil Aeronautic Authority (CAA) when it mentioned: "..and, solutions to these problems that have been suggested, there is none as satisfactory, in many respects, as airport zoning." Following federal leadership in this domain, many states since then have adopted legislation authorizing cities and counties to adopt regulations and ordinances limiting the height of structures around airports. By 1941, 31 states had this type of legislation enacted. Many more do today. While things have changed since 1930, they have changed for the better, not for the worse. The federal government position on airport and land use compatibility zoning has been very consistent in the last 60 years.

Today, 49 U.S.C. Section 44718 states, in pertinent part, that "The Secretary of Transportation shall require a person to give adequate public notice...of the construction or alteration, establishment or extension, or the proposed construction, alteration, establishment or expansion, of any structure...when the notice will promote: safety in air commerce, and the efficient use and preservation of the navigable airspace and of airport capacity at public-use airports."

The FAA utilizes Federal Aviation Regulation (FAR) Part 77, CFR 14, "Objects Affecting Navigable Airspace" in an effort to establish standards for determining obstruction to air navigation. In addition to Part 77, the FAA has published documentation of which the purpose is to supplement Part 77. Examples are: Advisory Circular 70/7460-2J "Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace" and Advisory Circular 150/5190-4A, "A Model Zoning Ordinance to Limit Height of Objects Around Airports." These documents are designed to promulgate safety standards.

However, the Federal Aviation Act of 1958, as amended, does not provide specific authority for the FAA to regulate or control how land may be used involving structures or obstructions that may penetrate the navigable airspace. The Federal Aviation Regulations Part 77 only requires "...all persons to give adequate public notice...of construction or alteration...where notice will promote safety in air commerce." The FAA has no power to enforce obstruction standards.

The Advisory Circulars published by the FAA are evidence that the FAA is unable to provide enforcement for situations that arise and have made efforts for the local governments to be informed about the responsibilities they have to establish zoning ordinances.

By examining the statutes relative to the FAA, we can confirm that there is no specific authorization for federal regulations which would limit structure heights, prohibit construction or even require structures to be obstruction marked and lighted. Congress chose to withhold such authority. Since it would involve federal zoning regulations and due process actions, including the taking of property and the paying of compensation, **the matter was best left with the states and the local authorities.** This federal void is filled by state and local authorities. States and local governments have the responsibility of enacting and enforcing airport-compatible land use.

Given the relative ineffectiveness of the current FAR Part 77 and the advisory nature of the other documentation, it is essential that state and local authorities maintain their ability to adequately regulate tall structures. The FCC NPRM discourages the state and local governments from filling in the federal voids to protect their airports and citizens. We believe that the safety and welfare of persons above and on the ground in the vicinity of airports should be a matter of **coordinated** federal, state, and local concern. The Federal government established the standards and recommendations, the state and local governments enforce them.

AOPA believes that another federal agency (FCC) should not attempt to do what the federal aviation agency cannot in terms of obstruction related aviation matters. The FCC NPRM has serious aviation consequences and therefore cannot ignore those entities (federal, state, and local) that not only have the expertise, but also the legal right to define obstructions that impact on navigable airspace, especially around **their** airports.

To protect the public by preventing properly located and constructed airports from becoming worthless through construction or growth of hazards or obstructions in and around such airports, state and local governments all point to zoning to limit the location and height of structures. A state, county, city, airport authority, corporation or individual can spend large sums of money for very essential public and private purpose of constructing and maintaining an adequate airport, only to have the airport rendered worthless and dangerous almost overnight by the erection of obstructions despite adequate and safe state and local zoning laws and regulations, and violating a myriad of these in the process.

Throughout the nation, local zoning and ordinances are the only means to enforce and limit the height of obstructions to airspace and aerial navigation near airports. AOPA is and has worked with state legislatures to improve existing laws and to establish new ones to limit the construction of tall structures that would be dangerous to aviation.

We also encourage local governments to adopt ordinances and land-use codes that protect navigable airspace, especially in the proximity of airports. This has successfully been achieved in some states where, beyond providing specific guidelines for airport land use compatibility and implementation of airport land use regulations, the state requires permits for any penetration to the FAR Part 77 surfaces. The end result is that local political subdivisions are required to adopt zoning to require a variance for any penetration to the Part 77 and to require appropriate lighting/marking as a condition of such variances. Examples like these represent the best, the safest and most efficient coordinated usage of federal standards, state law, and local ordinances.

While the arrangement between the two federal agencies can be considered a "gentleman's agreement," they both have to face the validity of the airport zoning statutes, which incorporate the basic legal principles which sustain the validity of the zoning. These are now firmly established in the legal jurisprudence of the majority of the states in this nation.

It would be inaccurate to believe that because FAA's Part 77 Regulations and associated processes such as notices of proposed constructions and aeronautical studies are not affected nor mentioned in the NPRM, that the NPRM's impact is non-existent in terms of safety of aerial navigation. This NPRM fails to consider that state and local zoning address and safeguard aerial navigation in cases where FAR Part 77 fails to require FAA notification.

The cases where Part 77 **Does Not** require FAA notification include:
(1) construction or alteration of LESS than 200 feet, (2) proposed construction of a tower less than 200 feet yet in the vicinity of airports privately owned/operated, (3) objects that are shielded by another object (This may lead to a gradual crawl towards an airport. Each tower is built just a little closer and soon there are 20 of them.), and (4) an addition in height of 20 feet or less to an existing antenna structure.

Furthermore, state and local laws and ordinances are the only protection the flying public has when the towers or obstructions in question are not even considered to be an obstruction under FAR Part 77. The cases where FAR Part 77 **Does Not** Consider to be an Obstacle are: (1) a height of 499 feet or less and (2) a height of 499 feet when right beside a private use airport.

Lastly, FAR Part 77 **Does Not** Consider the following in Determining if an Obstacle is a Hazard to Air Navigation: (1) when a VFR flyway is used many times for a week or two per year, yet not consistently on a daily basis, (2) the future form of navigating via direct (Free Flight Concept) is not addressed in the consideration (Off-airways flying is being utilized more now than ever and will be the primary way to navigate within the next 10-15 years), (3) FAR Part 137 Operations, (4) VFR Military Training Routes (MTR) (this is significant to GA because these MTRs are wider than depicted, and when navigating in the vicinity of an MTR, less attention is paid to the obstructions on the ground, it is also more significant now than ever due to the shortage of airspace the military has to utilize training procedures.), (5) any operation conducted under a waiver or exemption to the FAR's (pipeline patrol, power line patrol), (6) high Density Training Areas, (7) raising the Approach minimums at an airport served by only that one approach, and (8) raising a Minimum Obstruction Clearance Altitude (MOCA) to height of the Minimum En route Altitude (MEA) is OK if there aren't any plans to lower the MEA to MOCA height.

As it can been seen in these three instances, the elimination of certain state and local powers to analyze, regulate, and enforce aviation obstructions and zoning issues not only when covered by FAR Part 77, but also when not covered by these same regulations, will result in a loss of accountability for public safety and cripple state and local government's ability to zone themselves.

State and local governments define hazards contrary to public interest by finding that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also may in effect reduce the size of the area available for landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public and private investment therein. This understanding is the prevailing idea of zoning; to protect and preserve the health, safety and welfare of the communities in question.

If the FCC NPRM is implemented, many airport sponsors across the country will find themselves dealing with a fait accompli. This will prompt FAA's requirements in obstruction standards to be applied in order to mitigate the impact of the obstruction forced upon them at their own cost. These same standards, lacking enforceability to protect the airspace, are depending on state and local laws to be effective, finds themselves useless other than being used for the purpose of now forcing airports to pay for the safety of the flying public. The safety of the flying public was already addressed initially.

If serious constructive consideration is to be given to the petitioners request and intention with regards to DTV, it is imperative that these same entities find alternative and cooperative ways to work with both state and local government and agencies instead of forcing upon them another level of federal use of Commerce Power. This is a very serious matter when it is associated with FCC's tendency to overturn FAA determinations of hazards based on appeals and information submitted by construction proponents. **Accelerated implementation of DTV for commercial and business purposes cannot and should not be accomplished at the expense of the safety of the flying public.**

The protection of airport approaches from dangerous obstructions is a pressing legal problem. Furthermore, AOPA believes that actual implementation of the requested regulatory changes will undoubtedly and literally create hundreds if not thousands of legal conflicts all across the country. **This will not result in faster implementation of DTV in the United States.**

We thank you for the opportunity to provide these comments.

Sincerely,

Phil Boyer
President